Supreme Court, U.S.
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No. 07-109

In The
Supreme Court of the United States

JOHN J. PLOUGH, ET AL.,
Petitioners,

v.

JOHN LAVELLE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The Eleventh District Court of Appeals of Ohio

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

Petitioners challenged in State court the authority of a representative of a trustee to arbitrarily cut down every tree in a cemetery that was held in trust by the Catholic church for the benefit of the congregation and was subject to regulation by the Ohio Charitable Trust law. After the lawsuit was filed, the bishop, who is the trustee of the property, ordered an employee of the church hierarchy to conduct a hearing to determine if his representative made a correct choice to cut down the trees. Without notice to Petitioners or beneficiaries the tribunal ruled that they had such authority. Because of this ruling, the Appellate court ruled they did not have jurisdiction to review the trial court's decision granting Respondents partial summary judgment. Petitioners were denied both due process and equal protection of the law because they could not have a post-complaint, secret church decision reviewed by a state court. In addition, the court incorrectly found that the separation of church and state prevented state court interpretation.

The questions presented are as follows:

1. Whether the Ohio Court of Appeals erred in finding they did not have jurisdiction to review the trial court's decision granting summary judgment by misinterpreting numerous cases decided by this court on separation of church and state that allow review of secular disputes by citizens against the church hierarchy when such decisions are arbitrary and do not involve internal church affairs.

2. Whether the Ohio Court of Appeals denied equal protection of the law as guaranteed under the 14th Amendment of the United States Constitution to both

Petitioners and every person in the country who owns a plot or has a relative buried in a Catholic cemetery in Ohio, by refusing to afford them the same protection against arbitrary decisions of a trustee under the Ohio Charitable Trust law that persons who had a property interest in other cemeteries enjoyed.

3. Whether the Ohio Court of Appeals denied due process of law to every person in the country who has a dispute with a church, by finding that a decision of a church tribunal made after the lawsuit was filed, without notice and without input from respondents, prevented the court from reviewing that decision.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: John J. Plough, Cyrus B. Plough, Norman Mack, Edward Grodecki, Jr. and Robert Drugan.

*Respondents: John Lavelle, Thomas Tobin, Immaculate Conception Church, St. Mary's Cemetery Association, the Diocese of Youngs*town and the Attorney General of Ohio.

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PETITION FOR WRIT OF CERTIORARI

Petitioners John J. Plough, Cyrus B. Plough, Norman Mack, Edward Grodecki, Jr. and Robert Drugan, respectfully petition for a writ of certiorari to review the specified judgment of the Eleventh District Court of Appeals of Ohio and the denial of discretionary jurisdiction by the Ohio Supreme Court.

OPINIONS BELOW

The Portage County Common Pleas Court entered an Order in the case on September 19, 2005, (Appendix ["App."] E, *infra*,), which granted a partial summary judgment finding that Respondents could cut down any tree they wanted that was wholly within the cemetery grounds, but could not cut the trees along Mill Road that were partially on City property.

In an opinion issued on November 27, 2006, in a 2-1 decision, (App. D, *infra*), the 11th District Court of Appeals of Ohio dismissed the appeal by refusing to review the lower court's decision by finding they had no jurisdiction to rule on a dispute involving the church under the 1st and 14th Amendments to the United States Constitution.

The Ohio Supreme Court, in an Order filed on April 18, 2007, Justice Lansinger dissenting, (App. B, and C., *infra*), refused to accept jurisdiction. A Petition for Reconsideration and a Motion for Stay was denied by the Ohio Supreme Court, again, Justice Lansinger dissenting, in an Order filed on April 24, 2007. (App. A, *infra*).

JURISDICTION

The denial by the Ohio Supreme Court of a Motion for Reconsideration was filed on April 24, 2007. This petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§ 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

RELEVANT PORTIONS OF THE 1st, 5th and 14th AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES ARE INCLUDED IN APP. G, infra

AMENDMENT I, PROVIDES IN PERTINENT PART:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof{;}

AMENDMENT V, PROVIDES IN PERTINENT PART:
No person shall be ... deprived of life, liberty, or property, without due process of law[.].

AMENDMENT XIV, PROVIDES IN PERTINENT PART:
Section 1. ... No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT PORTIONS OF THE OHIO CHARITABLE TRUST LAW, Ohio Revised Code Sections 109.23, et seq., ARE INCLUDED IN APP. F, infra.

STATEMENT OF THE CASE

This Petition seeks a review of an opinion by the Ohio Court of Appeals finding that a secular dispute between cemetery plot owners, their descendents and the Catholic Church was not subject to review by that court. The decision wrongfully interpreted numerous decisions of the United States Supreme Court concerning the First Amendment's separation of church and state. This issue was first raised by Respondents in the trial court in their motion for Summary Judgment where it was claimed that the case was not subject to review by Ohio courts because the matter was to be decided under church law. Respondents further claimed that a decision made by a church tribunal, which consisted of an investigation by one monsignor who was employed by the church, made after the lawsuit was filed, was the final word on the matter. The trial court rejected that proposition, accepting jurisdiction, but partially granted Respondents summary judgment. (App. E, *infra*).

Since the trial court overruled this part of the Respondents argument, Petitioners, on appeal to the Eleventh District Court of Appeals, only argued the impropriety of the granting of Summary Judgment. After that court ruled they lacked jurisdiction to hear the case, Petitioners filed a Motion to Reconsider which addressed both the First Amendment issue on entanglement in church affairs and the Fourteenth Amendment issues on the denial of due process concerning the decision of the court tribunal concerning lack of notice and the time frame in which it was made. Although equal protection was not specifically mentioned at that time, Petitioners claimed that the church could not render the Ohio Charitable Trust law meaningless

in its application and violate public policy by allowing supposed language in a deed to prevent the enforcement of said law as it applied to property held by the Catholic church, and effectively deny equal protection of the law to catholic cemetery plot holders and their descendents. The Appellate court denied Petitioners' motion to reconsider, and rejected the Constitutional arguments. (App. D, *infra*). The Ohio Supreme Court, on discretionary appeal, denied jurisdiction and dismissed the appeal, rejecting all arguments made by Petitioners in the Court of Appeals. (See App. A, B and C, *infra*).

The catholic church, in the name of the local bishop, holds title to cemetery property in trust for the benefit of the congregation, which is broadly defined as past and present members of the church and their families. Petitioners and/or their parents purchased plots in the cemetery and most also have ancestors buried there. Petitioners' plots were chosen because of their location near three large oak trees. The cemetery is very small, less than 6 acres, and is located in Ravenna, Ohio. Over the 120 years of its existence, many oak, maple and pine trees had grown very large and added life, tranquility, great beauty and inner peace to the cemetery and those who visited the eternal resting places of their loved ones.

A new priest at the church , designated as caretaker of the cemetery, but with no experience, decided on his own, with no consultation or input from the beneficiaries of the trust (the congregation), no discussion with the trustee (the bishop), no advice from other custodians of parish or local cemeteries, and no written plan, to cut down the three century old oaks and every other tree in the cemetery. All the trees were healthy. No valid reason existed for any of

the trees to be cut down. The priest, Respondent, John Lavelle, admitted in deposition that he made the decision arbitrarily and it did not matter to him if 999 of 1,000 beneficiaries did not want the trees cut down.

When Petitioners learned of the trees coming down, they filed a Complaint requesting a temporary restraining order, damages and replacement of the trees that had already been removed. On December 30, 2004, the trial court granted a temporary restraining order preventing further removal of the trees. Petitioners were required to post a $6,000.00 bond. Two of the three large oaks, two 60 foot tall blue spruces, a large maple and several smaller trees were removed before the restraining order was issued.

Several months after the lawsuit was filed, the bishop ordered an investigation by a monsignor underneath him and an employee of Respondent, Diocese of Youngstown. No notice was sent to any of the beneficiaries except Petitioner, John Plough. Even though notice was sent to said petitioner by mail, Petitioner Plough never received the letter and earlier had informed counsel for Respondents in court chambers at a pretrial that Petitioners would never accept a member of the church hierarchy ruling on the propriety of the priest's decision.

Despite lack of notice and the declination of such a proposal, Respondents went forward with the hearing and found the priest could cut down the trees. Employees of the church, the bishop and the priest were the only people who presented information to the monsignor before he made his decision. No input from any of the other beneficiaries of the trust was ever asked for or received.

As indicated above, Respondents filed a motion for summary judgment and tried to claim this was an internal church matter and not subject to the jurisdiction of Ohio courts, attaching the decision of the church tribunal as evidence. For the first time, Petitioners were made aware of the monsignor's decision which Respondents claimed disposed of the matter.

The trial court rejected the claim that it lacked jurisdiction to review the case and gave no credence to the monsignor's ruling. However, they did grant partial summary judgment for Respondents by finding the church had authority to cut trees wholly within the cemetery property, never addressing the issue of beneficiary rights, but could not cut the trees along the road that were partially on city property. The appellate court continued the restraining order and granted a stay while the matter was appealed.

In a 2 to 1 split decision, the 11th District Court of Appeals held they lacked jurisdiction to review the lower court decision. They found the deed creating the trust allowed the church to decide what was done with all their property and therefore the post-complaint decision by the monsignor was controlling. This decision not only misinterpreted the deed, it also completely ignored the mandates of the Ohio Charitable Trust law, which Respondents are governed by, thus denying hundreds of thousands of Ohioans and others who own plots or have relatives buried in Catholic cemeteries equal protection of the law under the Fourteenth Amendment and the same rights as others who have property rights in all other Ohio cemeteries.

The Appellate Court's ruling also ignored decisions of this court that have repeatedly held that secular disputes not involving church hierarchy are reviewable under the First Amendment of the United States Constitution.

The decision also denied Petitioners due process of the law in two respects; first by refusing to review the lower courts decision, and second by relying upon the monsignor's decision that was made without due process, and after the lawsuit had been filed. That unsolicited opionion was made the focal point of the appellate court ruling.

On January 12, 2007, the Ohio Supreme Court continued the restraining order while they considered whether to accept jurisdiction. On April 18, 2007, the court in a 6-1 decision refused to hear the case and dismissed the appeal. On April 24, 2007, again in a 6-1 vote, the court rejected Petitioners' request for reconsideration and for a stay preventing the further removal of the trees.

Two stays were applied for in this court but rejected; first by Justice Stevens and then by the full court. After the second denial, all the remaining trees were cut down; three century old white oaks, one that was planted when Thomas Jefferson was president; three century old Norway spruces; two 60 foot blue spruces, a mature maple, an ash, a pin oak and a cherry, all healthy.

Petitioners maintain that this was not a matter of ecclesiatical rule and was most certainly reviewable by the civil courts. By relying upon a decision of the such a post – filing decision, the court denied Petitioners due process of the law. The specific aspects of the opinion for which review is sought will be described below as part of the

overall discussion of why, in petitioners' view, the petition should be granted.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

This court's general rule is that secular courts should not interfere with internal church disputes or matters involving "questions of discipline, or of faith, or ecclesiastical rule, custom, or law". However, this court has indicated that secular disputes between the church and individuals who were not part of the church hierarchy, were reviewable by both the State and Federal courts of this country. The exercise of such jurisdiction does not violate the First Amendment of the United States Constitution which separates church and state.

The Ohio Charitable Trust law governs all charitable trusts in Ohio; Defendants admit holding the cemetery property in question is creates a charitable trust. (See Appellate Court Decision at D-7, Paragraph. 15, of the Appendix). That law was designed to protect beneficiaries from arbitrary decisions of trustees. By misapplying the law and refusing to review decisions by a church employee trustee of the charitable trust, the Appellate court has excluded individuals, who may or may not be church members, from the class, and thus denied equal protection of the law to hundreds of thousands of individuals in this country who own plots or have relatives buried in Catholic cemeteries in Ohio.

In addition, the Appellate court's reliance on the unilateral decision of a church tribunal, who was an

employee of Respondent, made months after the lawsuit in this case was filed and without notice to or input from any Petitioners or beneficiaries of the trust, has unconstitutionally denied those same persons due process of the law. It is clear that the decision of the Ohio Appellate Court, which was in effect affirmed by the Ohio Supreme Court in their denial of jurisdiction, cannot pass federal constitutional muster. For that reason, Petitioners respectfully ask the Court to grant this petition and to disapprove, on federal constitutional grounds, the enforcement of the Ohio courts rulings in question herein.

II. THE OHIO COURT OF APPEALS ERRED IN FINDING THEY DID NOT HAVE JURISDICTION TO REVIEW THE TRIAL COURT'S DECISION GRANTING SUMMARY JUDGMENT BY MISINTERPRETING CASES DECIDED BY THIS COURT ON SEPARATION OF CHURCH AND STATE THAT ALLOW REVIEW OF SECULAR DISPUTES BY CITIZENS AGAINST THE CHURCH HIERARCHY WHEN SUCH DECISIONS ARE ARBITRARY AND DO NOT INVOLVE INTERNAL CHURCH AFFAIRS.

This court has consistently rejected jurisdiction on religious disputes that concern purely ecclesiastical or internal church matters. But, that does not mean every case that involves a religious party is not subject to review. In all those decisions, this court has recognized the necessity of civil courts ruling on matters that do not involve strictly religious disputes; and, even many that do.

Supreme Court precedent requires secular courts to hear issues of third parties disputing decisions of those affiliated with a church organization. The Ohio appellate court dismissed Petitioners' Appeal for lack of jurisdiction. We believe the Ohio Appellate court has grossly misinterpreted the law on this issue.

All the Supreme Court cases dealing with this First Amendment issue have a common theme, to wit: secular courts cannot interfere with matters of church government (polity) as well as those of faith and doctrine. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). (The same language was used in Watson v. Jones, 13 Wall. 679 (1872), a case decided before the application of the First Amendment to the States). That case, as well as the others, involved intra-church affairs, not external complaints.

This case involves a secular matter with parties outside the church hierarchy or polity (government of the church). The Kedroff case, *supra,* grew out of a dispute between the Moscow-based general Russian Orthodox Church and the Russian Orthodox churches in North America over a dissident group vying for control of the church and its property. This was an internal church matter which required interpretation of church doctrine, thus this court declined jurisdiction.

In Presbyterian Church v. Hull Church, 393 U.S. 440 (1969), this court stated: "It is true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution". Special problems arise when disputes involve church doctrine or practice. However, that same case goes on to say that marginal civil court review of **ecclesiastical** determinations

also would be appropriate; citing Brundage v. Deardorf, 55 F. 839 (C.C. N. D. Ohio 1893).

In Gonzalez v. Archbishop, 280 U.S. 1 (1929), Justice Brandeis said that "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical ..., are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.*, at 16. That case involved the appointment of Gonzalez to a chaplaincy in the Roman Catholic Church. Justice Brandeis recognized the obligations of civil courts to hear disputes where fraud, collusion or arbitrary decisions were made by church leaders.

In the case of Jones v. Wolf, 442 U.S. 595 (1979), at page 602, this court stated that in general, the First "Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization". First of all, our case does not involve religious doctrine. Secondly, our case does not involve religious polity, which is defined in Webster's dictionary as the form of government of a social organization. Thirdly, the Jones court was quoting from Serbian Orthodox Diocese v. Millivojevich, 426 U.S. 696 at 724-725 (1979), which involved the defrocking of a bishop (Millivojevich).

Before the statement referred to above, the Jones Court quoted from Millivojevich as saying "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice". (Emphasis added). However, "the First

Amendment does not dictate that a State must follow a particular method of resolving church property disputes...." Jones, *supra*, at 602. (Also citing Maryland & Virginia Churches (1970), 396 U.S. 367, 368). It should also be noted that in Jones, the Court expanded upon a "neutral principles of law" approach that allowed civil courts to hear church cases involving internal property disputes. So even if this court determines this is a matter of church policy, secular courts can rule on such matters by adopting the "neutral principles" approach. If this court would grant certiorari and reverse the lower court's decision, it would be up to them to apply the standards of that ruling.

> [T] he rule of action which should govern the civil courts... is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Millivojevich, *supra*, at 727.

As indicated above, our case does not involve any of these internal church matters concerning religious appointments, dismissals, matters of faith or doctrine , ecclesiastical law, control or otherwise. Even if it did, the courts can always rule on matters involving internal church matters if there is an allegation of fraud or arbitrariness. (See Gonzalez, *supra*). Our case is not only replete with allegations of fraud and arbitrariness, but also involves an external church matter where individuals outside the church government are alleging a breach of fiduciary duties by an individual acting in place of the designated trustee who had no

experience or training in the operation of a cemetery, presented no written plan for said cemetery and consulted with no one, not the trustee or his trusted employees, before his decision to cut down every tree and bush in a cemetery where Plaintiffs and others had spent thousands of dollars purchasing burial plots in reliance on the representations of the former designees of the trustee and the general appearance of the cemetery when the plots were purchased. Every single case decided by this court is distinguishable from the facts herein.

Of course the Gonzalez case, *supra*, stands for the proposition that even if it was an ecclesiastical matter, secular courts can still get involved if the decision being questioned is arbitrary or involves fraud. As indicated above, Respondent Lavelle admitted in his deposition that his decision was arbitrary. Even if he had not done so, his testimony that he did not consult with the trustee or any experts, had no written plan, and did not care if 999 out of 1,000 members of the congregation (the beneficiaries) did not want the trees cut down, clearly show his decision was arbitrary and thus subject to review under Gonzalez, *supra*.

This court has, in fact, ruled on matters that involve religious questions. In Texas Monthly v. Bullock, 109 S. Ct. 890, 489 U.S. ! (1989), this court struck down a Texas statute that tried to exempt religious publications from a sales tax. The court said

> When government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to

> the free exercise of religion, as Texas has done, see *infra*, at 17-20, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community. Corporation of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment). This is particularly true where, as here, the subsidy is targeted at writings that promulgate the teachings of religious faiths.[fn5] It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors. Bullock, *supra*, @ 15.

As Bullock and Amos, *supra*, demonstrate, this court has not backed down on reviewing cases that clearly are trying to create a benefit that would only apply to religious groups. {Also see Little v. First Baptist Church, 106 S. Ct. 1802, 475 U.S. 1148 (1986), where this court denied certiorari after the lower court did get involved in a religious dispute by issuing an injunction on behalf of the church preventing the Pastor from entering church property and terminating his position with the church}.

This court can also grant certiorari on the basis that this involves a property dispute. The neutral principles approach expanded upon in Jones v. Wolf, *supra*, would be the vehicle to determine whether the Ohio Court of Appeals should review the case.

In Niemann v. Cooley (1994), 93 Ohio App.3d 81, where the appeal to the Supreme Court of Ohio was not allowed in (1994), 69 Ohio St.3d 1478, the 1st District

Court of Appeals of Ohio, Hamilton County, held that purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization, are subject to review by the courts, even though it requires interpretation of canonical law. We submit that the Hamilton County Court of Appeals struck just the right distinction and balance in its analysis

We would also ask this court to consider the West Virginia case of Concerned Love Ones and Lot Owners Association of Beverly Memorial Gardens v. Pence (1989), 181 W.Va. 649, 383 S.E.2d 831 where it was said so well:

> A cemetery is a place where dead bodies of human beings are buried; an area of ground set apart for the burial of the dead, either by public authority or private enterprise. It includes not only lots for depositing the bodies of the dead, but also such avenues, walks and grounds as may be necessary for its use, or for shrubbery and ornamental purposes.
>
> "We are reminded of the words of Judge Brannon, sensitively addressing the character of the cemetery and its place in human nature."
>
> 'If relatives of blood may not defend the graves of their departed[,] who may? Always the human heart has rebelled against the invasion of the cemetery grave as the last and enduring resting place after the struggles and sorrows of this world'.
> [*quoting from* Ritter v. Couch, 71 W.Va. 221, 227, 76 S.E. 428, 430 (1912)].

Concerned Loved Ones held that when land has been dedicated to cemetery purposes, the next of kin of those buried in the cemetery , as well as those who own land for burial in the cemetery, have a cause of action to prevent, or recover damages resulting from, the unlawful desecration of such cemetery.

For these reasons, Petitioners' request for a review of the Appellate court decision by way of certiorari should be granted.

III. BY REFUSING TO AFFORD PROTECTION UNDER THE OHIO CHARITABLE TRUST LAW AGAINST ARBITRARY DECISIONS OF A TRUSTEE, THE OHIO COURT OF APPEALS DENIED EQUAL PROTECTION OF THE LAW, AS GUARANTEED UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, TO EVERY CITIZEN IN THE COUNTRY WHO OWNS A PLOT OR HAS A RELATIVE BURIED IN A CATHOLIC CEMETERY IN OHIO.

Respondents, the catholic church, cannot void the state law on charitable trusts, violate public policy or deny due process and equal protection of the law to those to whom they sell property rights, merely by putting words in a document that say property is held in trust under the rules, regulations, Canons and Discipline of the Catholic Church. Petitioners demonstrated in its motion to reconsider in the court of appeals that the deed in question was not worded as the appellate court stated. Respondent had incorrectly quoted such language in their brief and the appellate court accepted their presentation.

In the instant case, Respondents have admitted that this is a charitable trust. The Ohio Charitable Trust law is enforced by the Attorney General of Ohio in Title 109.23 et seq. of the Ohio Revised Code. (See Appendix F, *infra.*). No one forced the church to become involved in the ownership and management of cemeteries. Once they did, they became subject to the Ohio law on Charitable Trusts and to the jurisdiction of the courts of Ohio and the United States as to whether the interests of the beneficiaries have been taken into account before decisions involving that trust are carried out. Even if the appellate court is correct in its interpretation, the placement of language in a deed cannot rid them of their duties under the charitable trust law.

By denying jurisdiction to review actions of a trustee holding Catholic cemetery property in trust, the Appellate court has denied equal protection of the law as guaranteed under the 14th Amendment of the United States Constitution. The beneficiaries of the trust are plot holders in the cemetery and the children or other descendants of deceased plot holders. These individuals may live in Ohio or outside of Ohio. In the Youngstown diocese alone there are over 30 cemeteries, with tens of thousands of gravesites. By refusing to apply the Ohio Charitable Trust law to catholic cemeteries, this court has denied every person in the United States who is a plot owner of descendent thereof, equal protection under that law. They have created a class that is excluded from protection under Ohio law. Owners of plots in other Ohio cemeteries can at least have their grievances determined by Ohio courts. The Attorney General is currently litigating such a matter in the Hamilton County Court of Common Pleas.

Although the case below is not directly on point, it demonstrates this court's reasoning concerning equal protection violations. In Hooper, et al. v. Bernalillo County Assessor, 472 U.S. 612 (1985)
this court said
"when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[*fn6] Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose. Appellants claim that the distinction made by the New Mexico statute should be subjected to the higher level of scrutiny applied to the durational residence requirements in Memorial Hospital v. Maricopa County, supra, and Shapiro v. Thompson, supra. Alternatively, appellants claim that the statute cannot withstand the minimum rationality inquiry applied to the Alaska dividend distribution law in Zobel v. Williams, supra. Appellee, on the other hand, asserts that the statute need only satisfy the latter standard of review. As in Zobel, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends". Hooper, *supra*.

This Court has repeatedly and consistently held that gender-based classifications are subject to challenge on constitutional grounds, see, e. g., Reed v. Reed, 404 U.S. 71 (1971); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). A parallel construction of post-Civil War legislation that, in the words of Justice Holmes, "dealt with Federal rights and with all Federal rights, and protected them in the lump," United States v. Mosley, 238 U.S. 383, 387, 59 L. Ed. 1355, 35 S. Ct. 904 (1915), is obviously appropriate. Jayne Bray v. Alexandria Women's Health Clinic et al., 113 S. Ct. 753 (1993).

The Ohio courts exclusion of catholic cemeteries from scrutiny under the Ohio Charitable Trust law and its effect of denying those so situated the equal protection of the law is an error that this Court should remedy upon a grant of the instant petition.

IV. THE OHIO COURT OF APPEALS DENIED DUE PROCESS OF LAW TO EVERY PERSON IN THE COUNTRY WHO HAS A DISPUTE WITH ANY CATHOLIC CHURCH IN OHIO, BY RELYING UPON, AND ENFORCING, A DECISION OF A CHURCH TRIBUNAL MADE AFTER THE LAWSUIT WAS FILED AND WITHOUT NOTICE OR INPUT FROM PETITIONERS.

The decision of Monsignor Michael Cariglio, the vicar for the diocesan tribunal, should not have been considered by the Appellate court for any reason. It was ordered and decided after the lawsuit herein was filed. It was not evidence that could have been admitted at a trial. No notice was given to Petitioners of the inquiry and no input from them was ever asked for or received.

Before the action was commenced, Petitioners made numerous attempts to speak with Respondents Lavelle and Tobin.. Phone calls were made, but neither Bishop Tobin or Father Lavelle had the courtesy to return those calls. In addition, John Plough and his wife, Lola, attempted to attend the parish council meeting in August, 2004, before the trees were cut, but were told at the locked door to the parish, where the meeting was being held, that they were not permitted to attend. This was done after the individual who answered the door left for a short period of time to

consult with someone inside, presumably Respondent Lavelle.

Other individuals also tried to contact the hierarchy of the church without success. Monsignor Cariglio's affidavit in the motion for summary judgment did not mention that he failed to review the petitions with hundreds of signatures that were sent to Bishop Tobin soon after this suit was filed in early January, 2005, urging the Bishop and the church not to cut down any more trees at the cemetery. This was evidence of the wishes of individuals who were owners of plots and/or who had relatives buried there as to their desires, and should be at least equal to or even superior to the wishes of a priest who had only been in Ravenna for a little over one year. Mr. Cariglio should have considered these petitions before he made his decision.

He did not send notice to any of the other Petitioners, or those who had filed complaints with the Cemetery Dispute Resolution Committee, asking for their input or notifying them of his assignment to rule on the legitimacy of the priest's decision. If he had, perhaps he would have heard the other side of the story and not been able to come to such a bold assertion that "the claims of Petitioners have no validity and are empty and vacuous".

Mr. Cariglio also failed to notify any of the Petitioners of his decision or tell them the process for filing an appeal. Petitioners contend this was all part of a plan to deny them due process of the law.

All the court cases cited by Respondents in support of their position that secular courts lacked jurisdiction, involved appeals of a decision made by a church's

hierarchy before the case was taken to a state court. Our case is entirely different. No decision was made that could have been appealed prior to the cutting of the trees. All the conversations Mr. Cariglio had with the 4 employees of the church in making his unilateral decision, took place well after the lawsuit was filed. Petitioners only recourse was to seek injunctive relief through the courts.

The appellate court also stated on page 10 of its decision (App. D, *infra*) citing Milivojevich, supra., that "Civil courts are bound to accept the decisions of the **highest judicatories** of a religious organization ...." According to the Affidavits presented by Respondents, that would apparently be the Pope; and there are Cardinals in between the Bishops and the Pope. There is no evidence that this matter was heard by the highest judicatory of the Catholic church.

Using the decision of Mr. Cariglio to support the court's decision is comparable to an ex post facto law or to the admission into evidence at trial of an attempt to settle a case, which is clearly prohibited by law. Offers of compromise or settlement negotiations are generally inadmissible. Sherer v. Piper & Yenney (1875), 26 Ohio St. 476, paragraph one of the syllabus.

Rule 408 of the Ohio Rules of Evidence states in part as follows:

> Evidence of (1) ...offering..., or (2) ...offering or attempting to compromise a claim which was disputed as to ...validity..., is not admissible to prove ...invalidity of the claim.... Evidence of conduct or statements made in compromise negotiations is likewise not admissible.....

Due process arguments were presented to the appellate court. In our case the alleged offer was in a letter that Petitioner Plough never opened. This was purportedly the offer at conciliation many months after the lawsuit had been filed. Counsel for Petitioners had told Judge Enlow in chambers that they would not submit to any attempts to mediation by a person who was an employee of the church and basically a party Defendant. Instead of not going forward at all, Respondents seized the opportunity to deny Plaintiffs due process by talking only to party Defendants (Lavelle and Tobin) or their employees (Kun & Carfagna). As Rule 408, supra, states: offering to compromise a disputed claim is not admissible to prove the invalidity of the claim. That rule also states that evidence of statements made in compromise negotiations is likewise not admissible..... By presenting Mr. Cariglio's Affidavit concerning his one-sided conciliation proceeding and the Affidavit of his alleged superior who also reached the same conclusion, and the court's reliance on that decision to deny jurisdiction, both the appellate court and the church Respondents have denied Petitioners due process of the law as guaranteed to them both under the 5th and 14th Amendments of the Constitution of the United States.

The Ohio statute on mediation, Revised Code Section 2317.023, provides that the mediator must be a person who is not a party to the dispute and the mediator should be appointed by a court, administrative agency, not-for-profit community mediatiion provider, or other public body ... or the **parties** engage the mediator. Mr. Cariglio's procedure met none of these requirements. It was suggested by R.J. Laverne, the foremost expert on cemetery trees in this area, and perhaps the United States, that he

would be willing to act as a mediator. He even met with Respondents' counsel at the cemetery shortly after the lawsuit was filed. Respondents chose to by-pass him and go right to Mr. Cariglio, an employee who made no attempts to contact any of the parties other than by one letter to one individual.

In Connecticut and John F. Digiovanni v. Brian k. Doehr, 501 U.S. 1 (1991), this court held that failure to give notice to those having property attached violated due process.

> Because Connecticut's prejudgment remedy provision, Conn. Gen. Stat. § 52-278e(a)(1), violates the requirements of due process by authorizing prejudgment attachment without prior notice or a hearing, the judgment of the Court of Appeals is affirmed, and the case is remanded to that court for further proceedings consistent with this opinion. We are of opinion that the proposition, resting upon the want of notice, did not furnish a basis for the jurisdiction of the Circuit Court. The contention rests upon the assumption that the failure to give the notice under the state law was so essentially a prerequisite to a hearing on the question of probate that a probate made without the notice was null and void, and could collaterally be so treated.

Also see Farrell v. O'Brien, *FN1, 199 U.S. 89 (1905).

The failure on the part of the Ohio Courts to recognize the denial of due process requires this court grant review so as to settle the matter left unresolved as the result of the Ohio Supreme Court's denial of jurisdiction.

CONCLUSION

Therefore, and for all the foregoing reasons, Petitioners John J. Plough, Cyrus B. Plough, Norman Mack, Edward Grodecki, Jr. and Robert Drugan, respectfully request that this Court issue a Writ of Certiorari to the 11th District Court of Appeals of Ohio for review by this Court.

Respectfully submitted,

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Stow, OH 44224
330-414-1040
Counsel for Petitioners
Cyrus B. Plough,
Norman Mack,
Edward Grodecki, Jr.
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and
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330-296-4921

APPENDIX

SUPREME COURT OF OHIO:

Reconsideration of Prior Decision,
filed 04/24/07 ..... A1 - A1

Excerpt of Merit Decisions
with Opinions,
filed 04/18/07 ..... B1 - B1

Entry,
filed 04/18/07 ..... C1 - C1

COURT OF APPEALS ELEVENTH APPELLATE DISTRICT:

Opinion,
filed 11/27/06 ..... D1 - D15

COURT OF COMMON PLEAS PORTAGE COUNTY, OHIO:

Order and Journal Entry,
filed 09/19/05 ..... E1 - E11

APPENDIX, CONTINUED

OTHER:

109.23 Charitable Trust Defined ..... F1 - F1

109.25 Attorney General Is Necessary Party to Charitable Trust Proceedings ..... F2 - F2

109.26 Registration of Charitable Trusts ..... F3 - F3

Amendment I & V ..... G1 - G1

Amendment XIV G2- G2

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

April 24, 2007

[Cite as *04/24/2007 Case Announcements* #2, 2007-Ohio-1937.]

RECONSIDERATION OF PRIOR DECISIONS

2006-2407. Plough v. Lavelle.

Portage App. No. 2005-P-0083, 2006-Ohio-6200. Reported at ____ Ohio St.3d____, 2007-Ohio-1722. On appellants' expedited motion for reconsideration, expedited motion for stay of execution of Supreme Court judgment entry, and second request for expedited consideration. Motions denied.

Lanzinger, J., dissents.

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

April 18, 2007

[Cite as 04/18/2007 Case Announcements, 2007-Ohio-1722.]

APPEALS NOT ACCEPTED FOR REVIEW

2006-2407. Plough v. Lavelle.

Portage App. No. 2005-P-0083, 2006-Ohio-6200.

Lanzinger, J., dissents.

John J. Plough et al. Case No. 2006-2407

v. ENTRY

John Lavelle et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Portage County Court of Appeals; No. 2005P0083)

THOMAS J.MOYER
Chief Justice

THE COURT OF APPEALS ELEVENTH APPELLATE DISTRICT PORTAGE COUNTY, OHIO

JOHN J. PLOUGH, et al.,

Plaintiffs-Appellants,

- vs -

JOHN LAVELLE, et al.,

Defendants-Appellees.

OPINION

CASE NO. 2005-P-0083

Civil Appeal from the Court of Common Pleas, Case No. 2004 CV 1425.

Judgment: Appeal dismissed.

John J. Plough, pro se, 229 ½ South Chestnut Street, P.O. Box 72, Ravenna, OH 44266 (Plaintiff-Appellant).

Christian R. Patno, 1600 Rockefeller Building, 614 Superior Avenue, N.W., Cleveland, OH 44113 (For Plaintiffs-Appellants, Cyrus B. Plough, Edward Grodecki, Jr., Robert Drugan and Norman Mack, Jr.).

Richard Sopko, pro se, 408 South Freedom Street, Ravenna, OH 44266 (Plaintiff-Appellant).

Elaine Sopko, pro se, 408 South Freedom Street, Ravenna, OH 44266 (Plaintiff-Appellant).

Mary Beth Houser, 1200 Metropolitan Tower, 11 Federal Plaza Central, Youngstown, OH 44503 (For Defendants-Appellees).

Frank J. Cimino, City of Ravenna Law Director, 210 Park Way, P.O. Box 1215, Ravena, OH 44266 (For Defendant-Appellee, City of Ravenna).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, John J. Plough, et al., appeal the judgment of the Portage County Court of Common Pleas awarding summary judgment in favor of appellees, John Lavelle, et al. For the reasons herein, we dismiss the matter for lack of jurisdiction.

{¶2} The instant matter emanates from the planned removal of certain trees located in St. Mary's Cemetery,

located in Ravenna, Ohio. After ascending to the office of bishop, appellee, Bishop Thomas J. Tobin was granted legal title to, inter al., St. Mary's Cemetery, as trustee, under the rules, regulations, canons and discipline of the Roman Catholic Church for the use of the Catholic Diocese of Youngstown, its congregations, institutions, and agencies. Under Canon Law, the parish priest, appellee Father John-Michael Lavelle, was given full authority to administer all real property located within his parish, including the cemetery.

{¶3} Appellants, or their parents, had all purchased burial plots in the cemetery. In July 2004, Father Lavelle published in the church bulletin his intent to remove certain trees from the cemetery. The statement read:

{¶4} "Although very beautiful, these trees cause two very serious problems. First, when large limbs of [sic] even the entire tree themselves [sic] topple over in a storm, our insurance must cover the repair of the grave stones that are damaged. Second, the extending roots of the trees begin to push up the foundations, causing the grave stones to slant."[1]

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[1] The record contained additional evidence that the cemetery was in poor condition and that the tree removal was part of a

{¶5} In late November or early December 2004, Father Lavelle contracted with a tree removal company and work began on December 29, 2004. On the same day, appellant John Plough filed an action on behalf of himself and his brother to enjoin the cutting. The next day, appellant John Plough filed an amended complaint with several additional plaintiffs. Moreover, Attorney General Jim Petro was added as a defendant as required by Ohio's charitable trust laws. The trial court issued a temporary restraining order preventing Father Lavelle, Bishop Tobin, the Church, the Cemetery, and the tree removal company from any further removal of trees. On January 6, 2005, appellants filed their second amended complaint requesting a temporary restraining order, preliminary injunction, and a permanent injunction.

{¶6} The parties moved for summary judgment. Appellants argued that they are beneficiaries of the charitable trust created by the warranty deed conveying ownership of the

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larger refurbishment project which included tearing down an old chapel that several of the trees in question surrounded, widening the cemetery roads, and constructing a new maintenance building. Once the construction was complete, evidence indicated a new landscaping plan would be adopted and new trees planted.

property to Bishop Tobin as trustee. Father Lavelle, by the authority of Bishop Tobin, controlled the maintenance and upkeep of the cemetery. As a result, Father Lavelle inherited Bishop Tobin's fiduciary obligations in relation to such maintenance. However, in deciding to remove the trees, appellants alleged, Father Lavelle breached certain fiduciary duties he owed them as members of the congregation. Specifically, appellants alleged they had purchased burial plots in the cemetery in reliance upon and in expectation of the trees remaining in tact. As a result, appellants concluded, Father Lavelle's actions authorizing the trees to be cut down was arbitrary and a breach of his fiduciary duties.

{¶7} Appellees argued appellants were not beneficiaries under the trust because they were not listed in the deed creating the trust. As such, they are not entitled to any fiduciary duties under the trust. However, appellees submitted, even if appellants are beneficiaries, the matter is outside the jurisdiction of the trial court because a church tribunal had reviewed the matter and determined Father Lavelle acted within his proper authority in removing the trees.

{¶8} On September 19, 2005, the trial court granted appellees' motion for summary judgment as it pertained to the trees within the cemetery. The court determined appellees did not breach any fiduciary duties in removing the trees from the cemetery.[2] This appeal followed.

{¶9} Appellants assign the following errors for our review:

{¶10} "[1.] The trial court erred as a matter of law when it partially granted defendants' motion for summary judgment on September 19, 2005.

{¶11} "[2.] The court erred by not granting plaintiffs' motion for extension of time to complete the deposition of defendant Lavelle and have the request for admission of Bishop Tobin before responding to the church defendants' motion for summary judgment and by not allowing Richard Pahls to be substituted as a party plaintiff."

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[2] Appellants were awarded partial summary judgment regarding six trees that are located on the boundary to the cemetery. Appellees conceded that in order to remove these trees, they would comply with all relevant ordinances of the City of Ravenna.

{¶12} Summary judgment is appropriate under Civ.R. 56 (C) when (1) there is no genuine issue of material fact remaining to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the nonmoving party, that conclusion favors the moving party. *Temple v. Wean United, Inc.* (1977),50 Ohio St.2d 317, 327.

{¶13} Summary judgment proceedings afford an appellate court the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

{¶14} Under their first assignment of error, appellants maintain the trial court erred by failing to find appellees, as trustees of a charitable trust, breached their fiduciary duties by cutting down the trees.

{¶15} Here, neither party disputes that the cemetery property was the subject res of a charitable trust explicitly set forth in a recorded warranty deed signed and witnessed on February 1, 1996. The deed conveyed the ownership of the subject property to Bishop Thomas J. Tobin, in trust "under the Rules, Regulations, Canons and Discipline of the Roman

Catholic Church, primarily for the use and benefit of the several congregations, institutions, and agencies of the said Diocese of Youngstown ***."

{¶16} We must initially address whether the lower court and, by implication, this court possesses subject matter jurisdiction over the instant matter. As a general rule, civil courts lack jurisdiction to adjudicate purely ecclesiastical or spiritual disputes of a church. Presbyterian *Church v. Hull Church* (1969), 393 U.S. 440, 445. This principle is a recognition that "*** [all who unite themselves to such a body[, i.e. the church] do so with an implied consent to [its] government, and are bound to submit to it. *** It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical congnizance, subject only to such appeals as the organism itself provides for." *Watson v. Jones* (1871),80 U.S. 679, 729.

{¶17} Moreover, civil courts acknowledge a difference between hierarchical and congregational churches. A church is hierarchical when "the religious congregation *** is but a subordinate member of some general church

organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." *State, ex rel. Morrow v. Hill* (1977),51 Ohio St.2d 74,76. Alternatively, a congregational church is "a religious *** congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to a higher authority." Id., quoting Watson, supra at 723.

{¶18} The record indicates the Roman Catholic Church is a hierarchical polity with its own internal juridical structures. Hence, civil courts must accept the decisions of the highest judicatories of a hierarchical religious organization on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law. *Serbian E. Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 713.

{¶19} Here, appellees attached a document to Father Lavelle's affidavit entitled "cemetery easement." The document indicates that the purchase of a burial plot in St. Mary's Cemetery is conditioned upon and subjects the grantee to "[a]ll rules and discipline of the Roman Catholic Church,

and all rules and regulations of the aforesaid (Arch) Diocese now or hereafter existing in respect of the government of the aforesaid Cemetery as construed by the Grantor, shall be kept and observed." It appears the easement was introduced to show that the instant dispute falls within the exclusive jurisdiction of the church's judicatories. However, the attached easement is blank and thus, we believe it has no specific bearing upon the instant Litigation.[3]

{¶20} This conclusion notwithstanding, the warranty deed creating the trust provides that Bishop Tobin holds title to St. Mary's Cemetery, in trust, for the use and benefit of the congregation, "under the Rules, Regulations, Canons, and Discipline of the Roman Catholic Church ***" Absent this quoted reservation, we believe the instant matter would fall under the rubric of a non-doctrinal or non-ecclesiastical issue. However, because the trustee's duties to the congregation are derivative of the "the Rules, Regulations, Canons, and Discipline of the Roman Catholic Church," we believe the

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[3] Had the appellees produced similar documents signed by appellants, it would demonstrate that a contract was entered into whereby any concerns pertaining to the cemetery would be addressed by the rules of the Roman Catholic Church.

interpretation of these duties is a matter of "ecclesiastical rule, custom, or law."

{¶21} In his affidavit, Reverend Monsignor Michael Cariglio, Judicial Vicar for the Tribunal of The Roman Catholic Church, testified that the Roman Catholic church is governed by the revised Code of Canon Law. His affidavit continued:

{¶22} "6. Pursuant to Canon 519, the pastor of the parish is the proper shepherd of the parish entrusted to him and the pastor must carry out his duties of teaching, sanctifying and governing his parish, with the assistance of lay members of the Christian faithful.

{¶23} "***

{¶24} "8. Well know to all, the Roman Catholic Church has a hierarchical structure. This means that the Church is one in which proper authority is exercised by bishops and priests in an ascending succession of judicatories. On its highest lever [sic], the supreme authority is His Holiness Pope Benedict XVI, Bishop of Rome and head of the Universal Church. The bishop of each diocese throughout the world functions totally in full communion with the Pope as head of the Church. Within the diocese, for example, the

Diocese of Youngstown, the bishop of that diocese is in charge of its pastoral care with all administrative rights and obligations. Within each diocese, the pastor of a parish is assigned by his bishop for the pastoral care of that parish, with likewise the charge of all administrative rights and obligations.

{¶25} "9. Pursuant to Canon law, it is properly and clearly the authority of Reverend John-Michael Lavelle, as pastor of Immaculate Conception Church, to remove trees from St. Mary Cemetery, ***"

{¶26} Furthermore, attached to his affidavit is a copy of the Canonical Assessment authored by Monsignor Caliglio in his capacity as Judicial Vicar. In his decision, Monsignor Caliglio noted he attempted to persuade the litigants to enter into a conciliation process, which failed owing to appellant Plough's failure to respond. After reviewing the relevant facts and interviewing the Assistant Director of the Diocesan Cemeteries regarding Father Lavelle's actions, Monsignor Caliglio determined:

{¶27} "*** the complaints made by John Plough and others against the Pastor of Immaculate Conception Parish

relative to the parish cemetery do not have any validity and are empty and vacuous."

{¶28} Also attached to Monsignor Caliglio's affidavit was a document entitled "Animadversion of the Promoter of Justice." The Animadversion is a review of Monsignor Caliglio's determination, by the Promoter of Justice, Reverend Monsignor John A. Zuraw. After reviewing the matter, Monsignor Zuraw determined:

{¶29} "*** the rights of the parties have been protected and the procedures of the Code of Canon Law followed.

{¶30} "It is regrettable that Mr. John Plough has declined the invitation of conciliation offered by the Tribunal of the Diocese of Youngstown.

{¶31} "As Pastor of Immaculate Conception Parish, Father John-Michael Lavelle has demonstrated beyond any reasonable doubt the reasoning behind the razing of the trees in question.

{¶32} "Therefore, as Promoter of Justice, I state that the situation in question continues to be properly handled by Father John-Michael Lavelle, Pastor of Immaculate Conception Parish, Ravenna."

{¶33} Civil courts "are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of *** ecclesiastical rule, custom, or law." *Milivojevich*, supra, at 713. Because appellees' duties under the trust are conditioned by "Rules, Regulations, Canons, and Discipline of the Roman Catholic Church," we believe the instant matter necessarily involves the interpretation of ecclesiastical rule or law pertaining to the administration of a parish's real property. The lower court was consequently without power to infringe upon the church's disposition of the matter.

{¶34} We therefore hold that the trial court lacked jurisdiction to hear the dispute and was therefore bound to accept the decision of the Promoter of Justice. Given this conclusion, it is unnecessary for us to address appellant's second assignment of error.

{¶35} For the foregoing reasons, appellant's assigned errors lack merit and the instant appeal is dismissed.

DONALD R. FORD, P.J., concurs,
COLLEEN M. O'TOOLE, J., dissents.

STATE OF OHIO) **IN THE COURT OF APPEALS**

) **SS.**

COUNTY OF PORTAGE) **ELEVENTH DISTRICT**

JOHN J. PLOUGH, et al.,

Plaintiffs-Appellants,

- vs - **JUDGMENT ENTRY**

JOHN LAVELLE, et al., **CASE NO. 2005-P-0083**

Defendants-Appellees.

For the reasons stated in the Opinion of this court, the assignments of error are not well taken. It is the judgment and order of this court that the appeal is dismissed.

/s/ Cynthia Westcott Rice
JUDGE CYNTHIA WESTCOTT RICE

DONALD R. FORD, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

JOHN J. PLOUGH, et al.,

Plaintiffs,

v.

JOHN LAVELLE, et al.,

Defendants.

CASE NO. 2004 CV 1425

JUDGE JOHN A. ENLOW

ORDER AND JOURNAL ENTRY

***

I. INTRODUCTION

This matter is before the Court upon separate motions of Defendants Reverend John-Michael Lavelle, Immaculate Conception Church, The Most Reverend Thomas J. Tobin, The Catholic Diocese of Youngstown, and St. Mary Cemetery Association ("Church Defendants") and Defendant City of Ravenna ("Ravenna") for summary judgment on the claims of Plaintiffs John J. Plough, Cyrus B. Plough, Edward Grodecki,

Jr., Richard and Elaine Sopko, Robert Drugan, and Norman Mack, Jr. ("Plaintiffs").

Previously, this Court suspended action on the Church Defendants' motion in order to allow them to petition the Shade Tree Commission for approval or disapproval of removal of the trees and to supplement the record In this matter. The Church Defendants have requested that this Court proceed and rule on their motion.

Plaintiffs request that the Court enter final judgment on the motions.

II. STANDARD OF REVIEW

At this stage of the proceedings, the granting of judgment is only proper where no genuine issue of material fact remains for determination, the evidence being construed most strongly in favor of the defending party. Civ.R. 56(C) I *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327. Initially, the movant has the burden of demonstrating to the court that there is no genuine issue of material fact. "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a

court is to consider in rendering summary judgment. * * * If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. After the movant has met that burden, the defending party cannot rest on his pleadings, but must produce some credible evidence on those issues upon which he bears the burden of proof at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, at syll. 3.

III. FACTS AND LAW

This dispute arises from the removal or planned removal of trees from St. Mary Cemetery. There is no question of material fact presented by the evidence.

St. Mary Cemetery is located within the City of Ravenna. Upon ascending to the office of bishop, Defendant Bishop Thomas J. Tobin was granted legal title to St. Mary Cemetery, as trustee for the Roman Catholic Church and The Catholic Diocese of Youngstown and its congregations. St. Mary Cemetery is wholly owned, controlled, and administered as property of the Roman Catholic Church.

Under Canon Law the parish priest, here Defendant Father John-Michael Lavelle, has been given full authority to administer all parish real property.

Plaintiffs or their parents purchased burial plots in St. Mary Cemetery. With these purchases an easement and license was granted to each of them for burial purposes. These easements were made subject to the rules and discipline of the Roman Catholic Church. The diocese and parish retained full control of the real property for planning purposes and for making improvements.

St. Mary Cemetery has a number of large trees. Most of these trees are wholly upon cemetery property. Some few trees, apparently six in all, are on a portion of St. Mary Cemetery bordering Mill Road. These six trees have trunks or roots in the road right-of-way under the control of Ravenna. The affidavits of the surveyors offered by Plaintiffs and Ravenna tend to establish that the trees are in or intrude upon the road right-of-way. The Church Defendants stipulate that these six trees in St. Mary Cemetery along Mill Road are partially located in the road right-of-way.

A. Trees Wholly in Cemetery

The Church Defendants control St. Mary Cemetery under a trust for the benefit of the Roman Catholic Church. No evidence is offered tending to establish that the Church Defendants have violated any fiduciary duty to Plaintiffs. For those trees without trunks or roots in a road right-of-way, the Church Defendants have acted within their discretion in removing trees from the cemetery property.

Plaintiffs' principal argument is that the Church Defendants do not own the land of St. Mary Cemetery. This Court does not agree.

Plaintiffs have been granted only a right of easement and license for use of certain plots for burial purposes. No fee interest in the land was transferred to Plaintiffs. On the contrary, the Church Defendants retained the fee interest in the land of St. Mary Cemetery and made all burial plots subject to administration by the Church Defendants. Nothing offered in the Civ.R. 56 (C) evidence indicates that Plaintiffs' easements and licenses to their burial plots have been interfered with through the Church Defendants' removal of trees. Certainly, Plaintiffs can argue that the aesthetic nature

of the cemetery has been degraded, but their rights obtained by easement and license have not been infringed.

Further, nothing offered in the Civ.R. 56(C) evidence tends to indicate that Plaintiffs have suffered any compensable damages at the hands of the Church Defendants.

Based upon the Civ.R. 56(C) evidence and stipulations, Plaintiffs are not entitled to injunctive relief or damages against the Church Defendants for cutting or removal of the trees wholly located in St. Mary Cemetery.

B. Trees on Mill Road

Some six trees are located along Mill Road with trunks or roots partly located in the road right-of-way.

Both the surveyors' affidavits and the Church Defendants' stipulation establish that the six trees in St. Mary Cemetery along Mill Road are partially located in the road right-of-way. Section 1024.10 of the Ordinances of the City of Ravenna requires prior written permission of the Shade Tree Commission to cut or remove trees in a public road right-of-way. These six trees are clearly subject to the jurisdiction of the Shade Tree Commission, which has the

discretion to permit or deny removal of trees found in a road right-of-way. Apparently, the Church Defendants have not obtained approval of the Shade Tree Commission to cut or remove these trees.

Here, the Church Defendants agree that they must comply with Section 1024.10 of the Ordinances of the City of Ravenna in the event these trees along Mill Road are to be cut or removed. Further, the Church Defendants have stipulated that these six trees will not be cut down without first complying with the appropriate Ravenna ordinances. Finally, the Church Defendants have consented to entry of an order requiring all aspects of Section 1024.10 of the Ordinance of the City of Ravenna be followed by the Church Defendants. Based upon the Civ.R. 56(C) evidence and stipulations, Plaintiffs are entitled to judgment on their claim for injunctive relief against the Church Defendants prohibiting cutting or removal of the SIX trees on Mill Road without the approval of the Ravenna Shade Tree Commission.

C. Claims Against Ravenna

A thorough review of Plaintiffs' second amended

complaint reveals no readily discernable cause of action against Ravenna.

Plaintiffs, in their capacities as residents and taxpayers, do, however, state their desire to protect the six trees in the right-of-way of Mill Road from being cut or removed by the Church Defendants. This seems to indicate that they want Ravenna to enforce its ordinances against the Church Defendants, which is in the nature of a taxpayer's action under R.C. 733.59.

A taxpayer's action requires prior written notice to the law director. R.C. 733.59. This notice is jurisdictional, and without such notice a complainant cannot proceed with his action. Poposon v. Henn (1984), 17 Ohio App.3d I, 3. Here, no Civ.R. 56(C) evidence is offered tending to show that such notice was given to Ravenna's law director prior to filing the present lawsuit. That being the case, Plaintiffs' action against Ravenna must be dismissed for lack of jurisdiction.

Plaintiffs have made a general claim for damages against all Defendants, which presumptively includes Ravenna. In any case, under the facts presented, Ravenna and its officials are immune to any claim by Plaintiffs for damages. R.C. 2744.02, et seq.

Thus, Ravenna is entitled to judgment on all of Plaintiffs' claims.

D. Conclusion

Upon review and consideration of the motions, pleadings, stipulations, depositions, affidavits, and exhibits filed herein, and construing the evidence most favorably for the non-moving party, the Court concludes that Plaintiffs are entitled to partial judgment as a matter of law against the Church Defendants, the Church Defendants are entitled to partial judgment as a matter of law against Plaintiffs, and Ravenna is entitled to judgment as a matter of law, as set out below.

IT IS THEREFORE ORDERED that Plaintiffs John J. Plough, Cyrus B. Plough, Edward Grodecki, Jr., Richard and Elaine Sopko, Robert Drugan, and Norman Mack, Jr., be and hereby are granted judgment against Defendants Reverend John-Michael Lavelle, Immaculate Conception Church, The Most Reverend Thomas J. Tobin, The Catholic Diocese of Youngstown, and St. Mary Cemetery Association, and the Church Defendants are hereby enjoined from cutting

or removing any of the six trees in St. Mary Cemetery partially located in the Mill Road right-of-way, until the Church Defendants comply with Section 1024.10 of the Ordinances of the City of Ravenna and are granted approval to cut or remove said trees.

IT IS FURTHER ORDERED that Defendants Reverend John-Michael Lavelle, Immaculate Conception Church, The Most Reverend Thomas J. Tobin, The Catholic Diocese of Youngstown, and St. Mary Cemetery Association be and hereby are granted judgment against Plaintiffs John J. Plough, Cyrus B. Plough, Edward Grodecki, Jr., Richard and Elaine Sopko, Robert Drugan, and Norman Mack, Jr., on all other claims of Plaintiffs, including Plaintiffs' claims for damages and claims related to trees in St. Mary Cemetery which are not wholly or partially located in any road right-of-way.

IT IS FURTHER ORDERED that Defendant City of Ravenna be and hereby is granted judgment against Plaintiffs John J. Plough, Cyrus B. Plough, Edward Grodecki, Jr., Richard and Elaine Sopko, Robert Drugan, and Norman Mack, Jr., and Plaintiffs take nothing of Ravenna.

Costs taxed to the Church Defendants.

The Clerk is directed to serve upon all parties notice of this judgment and its date of entry upon the journal in accordance with Civ. R. 58(B).

SO ORDERED.

/s/ John A. Enlow
JOHN A. ENLOW
JUDGE
COURT OF COMMON PLEAS

cc: John J. Plough, Attorney for Plaintiffs and pro se
Kevin T. Poland, Attorney for Mary Beth Houser, Attorney for Church Defendants
Frank J. Cimino, Attorney for Ravenna
Michael Rzymek, Attorney for Attorney General

109.23 Charitable trust defined.

As used in sections 109.23 to 109.33 of the Revised Code:

(A) "Charitable trust" means any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious or educational purpose.

(B) "Charitable trust" includes the fiduciary relationship, the entity serving as trustee, the status as trustee, the corpus of such trust, or a combination of any or all of such meanings, regardless of the primary meaning of any use of the term, that is necessary in any circumstances to effect the purposes of such sections.

(D) The fact that any person sought to be charged with fiduciary duties is a corporation, association, foundation, or any other type of organization that has, under judicial decisions or other statutes, been distinguished from a charitable trust does not provide a presumption against its being a charitable trust as defined in this section.

Effective Date: 11-19-1975

109.25 Attorney general is necessary party to charitable trust proceedings.

The attorney general is a necessary party to and shall be served with process or with summons by registered mail in all judicial proceedings, the object of which is to:

(A) Terminate a charitable trust or distribute assets;

(B) Depart from the objects or purposes of a charitable trust as the same are set forth in the instrument creating the trust, including any proceeding for the application of the doctrine of cy pres or deviation;

(C) Construe the provisions of an instrument with respect to a charitable trust;

A judgment rendered in such proceedings without service of process or summons upon the attorney general is void, unenforceable, and shall be set aside upon the attorney general's motion seeking such relief. The attorney general shall intervene in any judicial proceeding affecting a charitable trust when requested to do so by the court having jurisdiction of the proceeding, and may intervene in any judicial proceeding affecting a charitable trust when he determines that the public interest should be protected in such proceeding.

109.26 Registration of charitable trusts.

Except as provided in this section, every charitable trust established or active in this state shall register with the attorney general. The attorney general shall prepare and maintain a register of such charitable trusts. The following are not required to register under this section:

(B) Charitable trusts in which all charitable interests are contingent and will vest only upon conditions which have not occurred;

(D) Such other classes of charitable trusts as the attorney general may exempt from registration by regulation pursuant to section 109.27 of the Revised Code.

Every charitable trust shall be registered with the attorney general in accordance with this section within six months after the effective date of this section, November 19, 1975, within six months after the creation of such trust, or within six months after occurrence of an event by reason of which such trust is required to register by this section, whichever is later, provided that all registrations of charitable trusts made prior to November 19, 1975, shall be deemed in full compliance with this section and no further registration shall be required.

No trustee of a charitable trust shall willfully fail to register such charitable trust as required by this section.

Effective Date: 01-10-1978

Amendment I: Freedom of speech, religion, press, petition and assembly.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V: Individual debt and double jeopardy.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV: Privileges or immunities, due process, elections and debt.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.